Office of Personnel Management

FPM Letter 351-21

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Chapter 351

RETAIN UNTIL SUPERSEDED

SUBJECT: Summary of Selected MSPB RIF Decisions (No. 3)

Washington, D C 20415
June 4, 1986

Heads of Departments and Independent Establishments

1. This FPM letter transmits a summary of selected reduction-in-force (RIF) decisions issued by the Merit Systems Protection Board (MSPB) and, where indicated, by the appropriate Federal court. This is the third FPM letter we have transmitted dealing with MSPB decisions on RIF; the first was FPM letter 351-15, dated September 1, 1981, and the second was FPM letter 351-19, dated October 11, 1985.

2. In preparing a RIF action, agencies should not rely solely on these summaries. The cases we cite in this FPM letter should be used in conjunction with the actual texts of the RIF decisions. As we learn of other RIF-related decisions which might be useful to agencies, we will update our listing.

3. The attachment to this FPM letter covers current sources of information concerning MSPB decisions.

4. Decisions by Subject-

(a) Assignment Rights: (Qualifications)

(i) Coleman v. Department of the Army, MSPB Docket No. SL03518110170 (February 10, 1984).

The Board found that the agency failed to offer the appellant his proper assignment rights when it neglected to (1) timely update his official personnel folder with documentation of additional job qualifications he submitted to the personnel office long before the agency issued specific RIF notices, and (2) inform the appellant that these documents were not contained in his official personnel folder prior to the date the agency issued specific RIF notices.

(ii) McMahon v. Department of the Army, MSPB Docket No. SL0351821290 (June 7, 1984).

The Board found that, in accordance with section 5 CFR 351.506, an employee's qualifications for assignment rights must be determined as of the effective date the employee is released from the competitive level.

(iii) Quartaro v. Department of Labor, MSPB Docket No. SL03518210227 (September 11, 1984).

Section 5 CFR 351.506 provides that the retention standing of each employee is determined as of the date the employee is released from the competitive level. The Board found that in the absence of a formal deadline for updating qualifications statements, the agency improperly refused to allow the employee to

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update his Standard Form 171 two weeks prior to the RIF, thus denying him assignment rights to another position.

(Retreat)

(i) Shell v. Department of Labor, MSPB Docket No. CHO3518410511 (March 25, 1985).

In reversing the decision of the presiding official and affirming the agency's determination of the employee's assignment rights, the Board determined that the appellant did not have retreat rights based on her conversion from a career GS-7 position to a GS-8 temporary limited position because the appellant was not promoted from or through the career GS-7 position.

(Vacant Positions)

(i) Baker v. Department of Commerce, MSPB Docket No. SEO3518210038 (February 22, 1984).

Section 5 CFR 351.201(b) (cite taken from the pre-July 3, 1985, RIF regulations) provides that an agency must follow OPM's RIF regulations if it offers a released employee assignment to another position under authority of 5 CFR part 351. During a RIF an employee has a right to be offered assignment to a vacant position after the agency both decides to fill the vacancy, and considers the relative bumping and retreat rights of the appellant vis a vis other released employees. The Board found that the appellant had no right to retreat to a vacant position because, although he had more total service, he was in the same subgroup as the employee who was placed in the position and the appellant had no retreat rights to the position to establish a claim above the incumbent.

(ii) Jamison v. Department of Transportation, MSPB Docket No. DCO3518211410 (May 8, 1984).

In the exercise of RIF assignment rights, section 5 CFR 351.701(a)(4) authorizes an agency to find that an otherwise qualified employee is not entitled to be assigned to an incumbered position if the displacement would result in undue interruption. However, the Board found that the undue interruption test is only applicable to the exercise of RIF assignment rights and not to the filling of vacancies, thereby allowing an agency to reach different results in evaluating an employee's qualifications for these two different kinds of placement actions.

(iii) Wilburn v. Department of Transportation, 757 F.2d 260 (Fed. Cir. 1985); MSPB Docket No. DCO3518210059 (February 23, 1984).

The petitioner accepted an offer of assignment to a lower-graded position after he was reached for a RIF action. While his appeal was pending before the Board, the appellant was reached for separation in a second RIF. On appeal the presiding official affirmed the first RIF action and a subsequent petition for review was denied by the Board. Prior to the effective date of the first RIF the agency established three vacant positions at the petitioner's original grade and offered the vacancies to three other employees who worked in the petitioner's office. Two employees in the petitioner's competitive level accepted the offers of vacancies; the remaining position was offered to an employee who

declined it and elected to retire. The agency then abolished the position declined by the employee who retired and established another position at the same grade, offering it to another employee who accepted the position. The petitioner alleged to the U.S. Court of Appeals for the Federal Circuit that the agency violated 5 CFR 351.201(b) (cite taken from the pre-July 3, 1985 RIF regulations) by not offering him the vacant position after the employee who retired declined the offer. The agency contended that it was not required to offer the vacant position to the petitioner after the other employee declined it. However, the Court concluded that the agency abolished the newly-created position for reasons personal to the petitioner which was inconsistent with both 5 CFR 351.201(b) and the merit system principles set forth in the Civil Service Reform Act. The Court then reversed the Board's decision and remanded the case for reconsideration under all pertinent regulations.

(b) Attorney's Fees

(i) Keely v. Merit Systems Protection Board, 760 F.2d 246 (Fed. Cir. 1985); MSPB Docket No. PHO3518210503 (January 23, 1984).

The appellant appealed a Board decision denying him attorney's fees to the U.S. Court of Appeals for the Federal Circuit after the Board had previously reversed a RIF action in which the agency had denied him assignment rights. The Court found that the agency's petition for review to the full Board lacked merit because the documents the agency offered contesting the reversal decision of the presiding official on the assignment rights issue failed to constitute new and material evidence not available when the record was closed. The Court reversed and remanded the Board's decision denying the appellant attorney's fees, holding that because the agency had no reasonable basis to believe that documents it had in its possession for almost three years constituted new and material evidence, attorney's fees were warranted in the interest of justice from the date the agency filed its petition for review.

(c) Commuting Area

(i) Beardmore v. Department of Agriculture, 761 F.2d 677 (Fed.Cir. 1984); MSPB Docket No. SFO7528410362 (July 12, 1984).

The U.S. Court of Appeals for the Federal Circuit reversed the separation of the appellant for refusing to accept a directed reassignment to a position located in another commuting area. The Court found that the agency failed to prove by substantial evidence that the definition of commuting area applicable to the site of the appellant's employment was a reasonable interpretation. The Court noted that an agency's discretion in defining the commuting area is not unlimited and must not represent an arbitrary or capricious action. In reversing, the Court agreed with the appellant's contention that the reassignment was invalid under agency policy since the agency would have reassigned the appellant to a vacancy in another nearby agency component had that organization been included in the same local commuting area as the appellant's worksite.

(d) Compliance

(i) Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1983); MSPB Docket No. BNO7528010005 (January 11, 1984).

The U.S. Court of Appeals for the Federal Circuit found that the Board erred as a matter of law when it ruled that its authority over the matter of compliance ended when petitioner resumed active duty in his former position at the same grade and pay. The Court directed the Board on remand to make a substantive determination of whether the duties and responsibilities of the position to which the employee was restored are the same, or substantially equivalent to the duties and responsibilities of the position held by the employee before the termination.

(e) Competitive Area

(i) Ginnodo v. Office of Personnel Management, 760 F.2d 246 (Fed. Cir. 1985); MSPB Docket No. CHO3518210502 (March 28, 1984).

Petitioner appealed to the U.S. Court of Appeals for the Federal Circuit that a decision by the Board affirming his one-person competitive area was improper since there was no other position for which he could compete for retention under OPM's RIF regulations. The Court found that the agency's designated competitive area met the standard required under 5 CFR 351.402; the petitioner was therefore not entitled as a matter of right to actually compete with other employees for retention.

(ii) Grier v. Department of Health and Human Services, 750 F. 2d 944 (Fed. Cir. 1984); MSPB Docket No. SFO3518210237 (April 17, 1984).

The U.S. Court of Appeals for the Federal Circuit affirmed a final decision of the Board holding that under 5 CFR 351.402 an agency is not required to expand a competitive area, either geographically or organizationally, so that some positions remain in the competitive area after jobs are eliminated for the purpose of providing actual RIF competition for a position. Instead, agencies must simply give effect to geography and/or organization, in the context of 5 CFR 351.402, in defining the competitive area within which the incumbent of an abolished position will be permitted to compete for retention.

(f) Furlough

(i) Andrzjewski, et al. v. Department of Labor, MSPB Docket No. PHO75283210189 (February 26, 1985). Stay granted, Donald Devine v. Stanley Andrzjewski, et. al., Miscellaneous Docket No. 47 (Fed. Cir. March 13, 1985).

In reversing the furlough of approximately 120 employees, the Board found that OPM's emergency furlough provision set forth in 5 CFR 752.404(d)(2) was invalid. The Board's decision noted that

the agency's actions represented harmful error, particularly since the agency had not complied with the due process procedures mandated by 5 U.S.C. 7513 (e.g., 30 days advance written notice, the opportunity to reply, etc.). After the Board issued its decision, it denied OPM's request for a stay pending the outcome of OPM's petition for review to the U.S. Court of Appeals for the Federal Circuit. However, by order dated March 13, 1985, the U.S. Court of Appeals for the Federal Circuit granted OPM's motion for stay pending further action by the Court.

(g) Harmful Error

(i) Cramton v. Department of the Treasury, MSPB Docket No. ATO3518090013REM (May 28, 1985).

(This decision was originally cited in FPM letter 351-15 and is now updated.) In petitioning for review of the remand decision in his appeal, the appellant contended that the presiding official's decision under a RIF analysis was in error, and contested the correctness of the post hoc application of RIF procedures by the Board in his appeal. The Board found that the reclassification of appellant's position due to loss of duties in a transfer of function should have been effected under proper RIF procedures. In consideration of the U.S. Court of Appeal decision in Horne v. MSPB, and the Circuit Court in Mayo v. Hodel, the Board found that it would be inappropriate to now decide how the agency might have acted if it had followed the proper RIF procedures because the agency had substantial discretion in deciding when to carry out the RIF, in defining the scope of competition in setting up the competitive areas and levels, and in considering various options in determining employee assignment rights.

(ii) Horne v. Merit Systems Protection Board, 684 F.2d 155 (1982); MSPB Docket No. DCO3518010067 (March 24, 1981).

(This decision was originally cited in FPM letter 351-15 and is now updated.) The U.S. Court of Appeals for the District of Columbia Circuit held that the role of review is to evaluate agency discretion as it has been exercised and the the Board should not be in the business of affirming administrative decisions based upon how an agency might have acted if it had followed proper procedures. In this case, the only clearly exercised act of discretion by the agency was its decision not to conduct a formal RIF. The Court vacated the Board's decision and held that when the Board decided that the demotions required a RIF, it should have remanded the case back to the agency. Neither the Board nor the courts can properly evaluate an agency's discretionary acts in conducting a RIF until that discretion has been clearly exercised.

(iii) Mayo v. Hodel, 741 F.2d 441 (D.C. Cir 1984).

The U.S. Circuit Court of Appeals for the District of Columbia Circuit held that the post hoc application of OPM's RIF regulations, in order to determine whether this application might alter the outcome of the agency's action, is permissible where the Board is "plainly right" in the application of the RIF procedures. The Court distinguished Horne, wherein the agency had some discretionary leeway to reach more than one proper outcome in applying the RIF regulations, from Mayo, wherein the agency had no comparable discretionary leeway.

(h) Performance

(i) Haataja v. Department of Labor, MSPB Docket No. CHO3518210565 (January 7, 1985).

The Board held that an agency's decision to effect a RIF action against an employee necessarily includes a review of whether (1) the agency ensured that additional service credit for performance awarded to employees under 5 CFR 351.504 is consistent with the agency's performance appraisal system established under 5 CFR subpart 430-B, and (2) the agency's determination of each employee's entititlement to additional service credit is consistently applied in any one RIF. In remanding the case to the regional office, the Board sought to provide the agency with an opportunity to refute the appellant's allegations that it failed to award RIF service credit for performance in a manner that was consistent with the agency's performance appraisal system.

(ii) Mazzola v. Department of Labor, MSPB Docket No. BNO3518210086 (January 7, 1985).

The Board concluded that in cases where an employee asserts that he or she was entitled to a performance rating prior to the date the agency issued specific RIF notices, the agency must show that it reasonably exercised its discretion in consistently implementing the provisions of its performance appraisal system concerning the scheduling of performance ratings and maintaining these records; these actions are necessary in order to properly afford the employee his or her substantive rights to correct retention standing in a RIF. If the performance rating due an employee under an agency's performance appraisal system is not officially approved and on record as of the date the agency issues specific RIF notices, then the agency must show that the absence of the rating was due to a reasonable exercise of agency discretion in accordance with the provisions of its performance appraisal system. In sum, the agency must show under 5 CFR 351.504 that the performance rating of record which it considered in determining the employee's retention standing represented a reasonable and consistent implementation of the agency's performance appraisal system.

(i) Purview

(i) Atwell, et. al v. Merit Systems Protection Board, et. al., 670 F.2d 272 (D.C. Cir. 1981); MSPB Docket No. PHO75299098 (July 25, 1980).

The U.S. Court of Appeals for the District of Columbia Circuit found that 5 U.S.C. 5366(b) bars the appeal to the Board of individual downgrades pursuant to reclassification where grade and pay retention benefits are accorded to affected employees. (Under authority of 5 U.S.C. 5366(a)(2)(B), however, an employee who is reached for a RIF action is not barred from appealing even though the employee is eligible for grade and/or pay retention under subchapter VI of chapter 53, title 5, U.S.C.)

(ii) Johnson v. Department of Labor, MSPB Docket No. DCO3518210559 (February 14, 1985).

In a RIF action that resulted in a change of position and the downgrading of appellant, the presiding official dismissed her appeal on the ground that she had elected under 5 U.S.C. §7121(d) to pursue the matter under a negotiated grievance procedure. The Board on appeal reversed the initial decision and remanded the case back to the regional office because the Board found that the agency had failed to afford the appellant with proper notice of her potential avenues of recourse. When an appellant raises an allegation of discrimination in connection with a RIF appeal, he/she has the option under 5 U.S.C. §7121(d) to pursue the matter before the Board or through a negotiated grievance procedure. The agency failed to appraise the appellant in this case of her options of appeal thereby making her choice of remedies an uninformed election.

(j) Reassignment

(i) MacMurdo v. Department of Agriculture, MSPB Docket Nos. SF07258310221 and SF07528310064 (November 15, 1984).

The appellant was removed under the 5 CFR part 752 adverse action procedures after he refused to accept an ordered reassignment to a vacant position at the same grade in a different commuting area. In denying the appellant's petition for review and affirming the decision of the presiding official that the removal action was proper, the Board rejected the appellant's argument that the agency was required to invoke the 5 CFR part 351 RIF regulations when it chose to fill a vacancy with an employee whose position had been abolished. Both parties agreed that had the agency conducted a RIF, the appellant would have displaced a lower-standing employee and would not have been transferred to a position 300 miles away. However, since the position offered to the appellant was both vacant and at his current grade, the agency was not obligated to first apply the RIF regulations before reassigning the appellant to the new worksite.

(k) Reemployment Priority List

(i) Ziegeldorf and Rizzolo v. ACTION, MSPB Docket Nos. CH03308210346 and CH03308210179 (January 12, 1984).

The Board affirmed a decision by the presiding official that the agency improperly failed to refer to the appellants' names on the Reemployment Priority List before the agency filled competitive positions by temporary appointment with individuals not on the list.

(l) Release from Competitive Level

(i) Hanks, et. al. v. Federal Emergency Management Agency, MSPB Docket Nos. AT03518211064; and AT03518211050 (October 17, 1984).

After consideration of the appellants' arguments, the presiding official ordered the agency to cancel its RIF actions because the agency had simply released employees from a master retention rather than first assigning each employee to a properly-established competitive level. The Board granted the agency's petition for review and agreed with the agency's contention that it properly afforded the appellants their substantive rights when, due to a nationwide reorganization of the agency in which all positions were abolished, all employees were placed in newly-created positions in a new organizational structure based on their tenure and retention standing. In reversing the initial decision and affirming the agency's RIF actions, the Board further found that since all of the agency's employees were released simultaneously, the agency's failure to establish individual competitive levels was not of importance since the creation of a competitive level structure would not have afforded the appellants any substantive rights. The Board found, therefore, that the agency had met its burden of proof that the appellants were properly released regardless of their competitive levels and that it had accorded all employees their substantive RIF rights.

(m) Reorganization

(i) Bacon, et. al. v. Department of Housing and Urban Development. 757 F.2d 265 (Fed. Cir. 1985); MSPB Docket No. DC03518310188 (April 25, 1984).

The U.S. Court of Appeals for the Federal Circuit upheld the Board's finding that the agency's RIF actions were actually a valid reorganization as defined under 5 CFR 351.203. In rejecting the appellants' argument that the agency had not used any of the specific terms set forth in 5 CFR 351.201(a) to describe the release of employees from competitive levels, the Court added that while the agency did not initially use the term "reorganization" at the time it proposed the RIF, the agency did in fact properly refer to the pending RIF as a reorganization after the U.S. Court of Appeals for the District of Columbia Circuit found that a statutory prohibition contained in the Appropriations Act of 1983 was unconstitutional.

(ii) Dziedzic v. Department of Energy, MSPB Docket No. ATO3518210916 (December 10, 1984).

The Board reversed the presiding official's decision affirming the downgrading of the appellant due to a reorganization that led to the abolishment of his former position on the grounds that the newly-created position was substantially different from the position appellant held. The Board found that while the agency made a prima facie showing that the RIF was undertaken for proper reasons, the appellant presented sufficient evidence that the position he formerly held was restructured under another title in the new organization, thereby casting doubt on the bona fides of the RIF with regard to the abolishment of his position. Although the two positions under consideration were not identical in every detail, they were in fact substantially the same, particularly with regard to the major duties and responsibilities of the position. The Board added that the accumulated evidence of record did not prove that the qualitative differences between the two positions were of sufficient magnitude to justify the abolishment of the appellant's position and the creation of the new position at the appellant's former grade.

(iii) Johns v. Department of the Interior, MSPB Docket No. SFO3518410025 (September 19, 1984).

The presiding official reversed the downgrading of the appellant because of reorganization, finding that the agency had not met its burden of proof that it had a smaller workload, or that there were differences in the positions the appellant held before and after the RIF. Referencing Stechler v. Department of Energy, MSPB Docket No. NYO3518210062 (March 13, 1984), (cited below in this FPM letter), the Board reversed the initial decision and affirmed the agency's RIF action noting that the appellant had much less supervisory responsibility in his new position, and adding, that changes in the number of employees supervised and the method by which they are supervised significantly alters the managerial responsibilities of a position.

(iv) Kanner v. Department of the Army, MSPB Docket No. PHO3518110125 (February 28, 1984).

(Kanner was originally cited in FPM letter 351-15 and is now updated.) The matter of appellant's downgrading has been before the Regional Office on appeal or remand three times. The first time, before the action was taken under RIF procedures, it was found to be procedurally defective. After the action was taken under RIF procedures, the Board's Philadelphia Regional Office, without a hearing and without considering certain agency evidence which was improperly stricken from the record as a sanction, issued an initial decision affirming the agency RIF action. The Board, however, citing Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980), with respect to the presiding official's incorrect placement of the burden of proof on the appellant, vacated that initial decision and remanded the case to the Regional Office. Kanner v. Department of the Army, 4 MSPB 215 (1980).

The Board reviewed the record as a whole and found that the agency established, by a preponderence of the evidence, that (1) the appellant's positions before and after the reorganization were substantially different and that the appellant's former position was actually abolished, and (2) the agency had supported the bona fides of the RIF. The Board then reversed the initial decision of June 1981, and sustained the agency's RIF action.

(v) Renning, Gore, and Kaufman v. Department of the Interior, MSPB Docket Nos. SF03518510021, 22, and 23 (July 26, 1985).

In denying the appellants' petition for review, the Board agreed with the findings of the presiding official that the agency properly downgraded the appellants because of reorganization. Although the tasks the appellants performed did not substantially change after the reorganization, the ultimate responsibility for certain work shifted and was redistributed among several team leaders under whose supervision the appellants now work.

(vi) Stechler v. Department of Energy, MSPB Docket No. NY03518210062 (March 13, 1984).

The Board affirmed the downgrading of the appellant by RIF after finding that the appellant's position was reorganized. The Board noted that while the appellant's former position and a newly-created position shared the same duties, the position descriptions showed significant differences in the supervisory duties between the two positions. The Board found that although the old and new positions were otherwise virtually identical, a proper reorganization took place since the new position reflected changes in (1) the number of subordinate employees supervised and (2) the reporting lines of supervisory authority. Such changes alone, the Board concluded, constituted a meaningful and significant alteration of the incumbent's managerial responsibilities.

(vii) Streitfeld v. Railroad Retirement Board, MSPB Docket No. CH03518110608 (March 28, 1984).

The Board stated that an agency decision to eliminate positions by contracting out qualified as a reorganization as defined in 5 CFR 351.203.

(n) Retirement

(i) Covington v. Department of Health and Human Services, 750 F.2d 937 (Fed. Cir. 1985); MSPB Docket No. DC03518210591 (January 19, 1984).

Because the petitioner retired on the date that his agency (e.g., the Community Services Administration (CSA)) was abolished, both the presiding official and the full Board denied his appeal for lack of jurisdiction because he had retired prior to his separation by RIF. However, the U.S. Court of Appeals for the Federal Circuit reversed, noting that the petitioner's RIF notice failed to state that his involuntary retirement would forfeit any rights he would otherwise have in appealing his agency's RIF action. The Court added that the agency also failed to inform the petitioner of his possible entitlement to

another position because of a transfer of certain of CSA's functions to another agency. Concluding that the petitioner's decision to retire was thus not voluntary, the Court remanded the case to the Board so that he may show at a hearing that the agency's actions denied him retention rights.

(ii) Gonzalez v. Department of Transportation, 701 F.2d 36 (5th Cir. 1983); MSPB Docket No. DA03518010302 (August 6, 1982).

The presiding official dismissed the petitioner's appeal because she resigned prior to separation by RIF in order to accept discontinued service retirement. After the full Board denied her petition for review, the petitioner then appealed to the U.S. Court of Appeals, Fifth Circuit. The Court remanded the case to provide the petitioner with a hearing on the voluntariness of her resignation since the agency had not advised the petitioner that by voluntarily resigning and applying for discontinued service retirement she would lose her right to appeal the RIF action.

(o) Temporary Employees

(i) Starling v. Department of Housing and Urban Development, 757 F.2d 271 (Fed. Cir. 1985); MSPB Docket No. DC03518310187 (May 23, 1984).

The petitioner appealed the Board's final order reversing the presiding official's decision and sustaining the agency's separation of the petitioner by RIF. The U.S. Court of Appeals for the Federal Circuit concluded that the agency was under no obligation to assign the petitioner to a temporary position in another competitive level because a temporary employee is not listed in a tenure group, does not compete in a competitive level, and therefore would not be subject to displacement by a released competing employee. The Court affirmed the decision of the Board sustaining the separation of the petitioner.

(p) Timeliness

(i) Lewis, Powers, and Yuni v. Small Business Administration, MSPB Docket Nos. DC03518510056; DC03518510052; and DC03518510053 (April 23, 1985).

The appellants were downgraded because of misclassification, but filed a RIF appeal with the Board for the first time after learning that the Board held in an appeal involving their coworkers that the agency should have used RIF procedures in effecting the downgradings. The appellants noted that they appealed within 20 days after they learned of their coworkers' successful pursuit of their appeal, and asserted that the agency's failure to notify them of their appeal rights constituted good cause for extending the filing deadline. The Board denied the appellants' petition for review finding that although the appellants were not advised of their right to appeal, in fact, they were aware of their coworkers' appeal; thus, there was no basis for the late filing of an appeal on the same matter.

(g) Transfer of Function

(i) Certain Former CSA Employees v. Department of Health and Human Services, 762 F. 2d 978 (Fed. Cir. 1985); MSPB Docket No. DC03518210251 (June 18, 1984).

The Board decided that many, if not most, of the employees separated by RIF from the Community Services Administration (CSA) concurrent with that agency's abolishment on September 30, 1981, would in any case have been reached for separation notwithstanding certain improprieties in the way those RIF actions were effected. The Board held that the appealed actions would be sustained unless the appellants were able to show on remand that the failure of the CSA to conduct a proper transfer of function and subsequent RIF, deprived each of them of a substantive right to be retained in the Office of Community Services (OCS), a component of the Department of Health and Human Services. In remanding applicable cases to the regional offices, the Board afforded each individual appellant the opportunity to show that he or she had been improperly denied retention rights. The Board noted that a function has to be a clearly identifiable activity of the agency's mission which consists of substantial authorities, powers, and duties.

(ii) Seidel v. Department of Agriculture, MSPB Docket No. ATO3518211350REM (March 7, 1985).

(This decision was originally cited in FPM letter 351-15 and is now updated.) The Board remanded the case to the Regional Office so that the appellant may have an opportunity to prove a connection between a possible transfer of function and his separation by RIF a year later. After the presiding official found in the initial decision on remand that no transfer of function had taken place, the Board granted the appellant's petition for review. Referencing Childress v. United States, 222 Ct. Cl. 557, 558 (1980), Neilson v. Federal Highway Administration, MSPB Docket No. PHO3518310107 (June 7, 1984), (cited in FPM Letter 351-19), and Kentner v. National Transportation Safety Board, MSPB Docket No. CHO3518210465 (May 11, 1984), the Board found that the appellant had no transfer of function rights under 5 CFR subpart 351-C because where, in cases like this, the agency realigns geographic boundaries so that an installation performing a particular function begins to handle that function for a wider area, no transfer of function occurs. Instead, the receiving installation merely assumes responsibility for another part of a single function. After finding that the appellant had no transfer of function rights, the Board turned to the RIF action which precipitated the initial appeal and, in reversing the separation of the appellant by RIF, found that the appellant had assignment rights to a clerical position based on his non-Federal work history and his long experience in positions with regular general administrative duties.

(M) Use of RIF

(i) Blalock, et. al. v. Department of Agriculture, MSPB Docket No. ATO3518110533 (January 31, 1985).

Each appellant, who was the single occupant of both a competitive level and competitive area, was separated by RIF after the agency advised that their Schedule A positions were abolished as the result of Executive Order 12300, which redesignated the positions as Schedule C. On appeal to the Board the cases were consolidated and assigned to an Administrative Law Judge (ALJ) for hearing and adjudication. The ALJ found that no reclassification requiring a RIF resulted solely from the designation of the positions as Schedule C; also, no change in duties had taken place, so that the separation actions were removals for cause rather than by RIF. In subsequently examining the separations as adverse actions, the ALJ concluded that the agency had not accorded the appellants the procedural protections of 5 U.S.C. 7511-7513, that the appellants were actually removed from the Schedule A rather than the Schedule C positions, and that while those appellants who were preference eligibles had the right to appeal the removal actions to the Board, nonpreference eligibles in the excepted service have no comparable right to appeal to the Board and thus, dismissed their appeals.

After considering three separate petitions for review, the Board affirmed the ALJ's determination that a reorganization did not occur since, by definition found in 5 CFR 351.203, a reorganization requires that there be a change in functions or duties and, based upon the position descriptions for the old and the new positions, no change took place. The Board also rejected the agency's argument that the appellants were removed from their positions solely because of the Executive Order, adding that some properly executed personnel action (either through RIF or adverse action) was necessary to divest the appellants of their Schedule A appointments. Finally, the Board affirmed the other issues decided by the ALJ, including the decision that the nonpreference eligible employees in this instance had no rights under 5 U.S.C. chapter 75 which the Board could enforce.

(ii) Cobb v. Department of Labor, 774 F.2d 475 (Fed. Cir. 1985); MSPB Docket No. SF03518410234 (August 13, 1984).

The petitioner was separated by RIF from a part-time position, which she shared with another part-time employee, after the agency abolished their two part-time positions and established instead one new full-time position. Upon appeal the Board affirmed the decision of the presiding official that the agency conducted the RIF for a proper reason and that the agency had not erred by offering the new full-time position to her. However, the U.S. Court of Appeals for the Federal Circuit found that the agency's actions did not meet the definition of a reorganization as set forth in 5 CFR 351.203 (i.e., there was no elimination, addition, or redistribution of functions or duties in the organization). Since the agency made no changes in the description of the abolished part-time shared position, the Court found that the agency simply made the former part-time shared position a full-time position. The Court added that to do no more than assert that changing a job-sharing arrangement to a single full-time position is a proper reorganization would be to circumvent the established merit principles of 5 U.S.C. 2301. In

reversing the agency's RIF action, the Court stated that the agency's determination within the meaning of OPM's RIF regulations was an abuse of agency discretion.

(iii) Gandola and Jones v. Federal Trade Commission, 773 F.2d 308 (September 19, 1985); MSPB Docket Nos. CH03518310430 and CH03518310432) (September 28, 1984).

The U.S. Court of Appeals for the Federal Circuit affirmed a decision of the Board which upheld an action of the agency in removing the petitioners from their positions. The petitioners, who were attorneys in the excepted service, argued that their agency improperly considered the qualifications of particular employees in deciding which positions to eliminate, and that the RIF actions which affected them were based upon personal rather than legitimate managerial considerations. The Court found that the agency appropriately considered the relative abilities of existing employees in determining which positions to eliminate in order to develop an organizational structure that could effectively continue to perform the agency's work with a smaller staff.

(iv) Madsen v. Veterans Administration, 754 F.2d 343 (Fed. Cir. 1985); MSPB Docket No. SLO3518310252 (April 17, 1984).

The U.S. Court of Appeals for the Federal Circuit affirmed the decision of the Board holding that there was no basis for overturning the agency's downgrading of the petitioner pursuant to a RIF. The Court noted that the Board correctly determined that the question of whether the position of a displacing employee is correctly classified is not within the Board's jurisdiction; referencing Brace v. Department of Housing and Urban Development, 11 MSPB 451 (1982), aff'd, No. 83-580 (Fed. Cir. June 3, 1983) (unreported), the Court found no statute or regulation which empowers the Board to review the merits of an agency's decision concerning either the classification of a displacing employee's position, or his or her qualifications for that position.

(v) Swift v. Department of Education, MSPB Docket No. SEO3518410003 (September 21, 1984).

After being advised in a specific RIF notice that his position was abolished, and that he would be separated because he had no assignment rights, the appellant applied for and was selected for a lower-graded position on the basis of the agency's misrepresentation that he had no assignment rights to a position at his former grade. The presiding official found that the appellant did, in fact, have assignment rights to the position he sought, and that the appellant's application for and acceptance of the lower-graded position was involuntary, providing Board jurisdiction over the appeal per Scharf v. Department of the Air Force, 710 F.2d 1572 (Fed. Cir. 1983), and Christie v. United States, 518 F.2d 585, 587-588 (Ct. Cl. 1975). The Board ruled that it need not decide whether the appellant's acceptance of the lower-graded position was involuntary under the standard enunciated in Scharf to find a basis for jurisdiction, inasmuch as the appellant was entitled to an appeal under part 351 because he was affected by a RIF action within the meaning of 5 CFR §351.201(a).

(vi) Tucker v. Consumer Product Safety Commission, MSPB Docket No. SF03518210292 (July 6, 1984).

The Board modified the decision of a presiding official, and reversed the separation of the appellant by RIF, after rejecting the agency's argument that it abolished the appellant's 24-hour per week position and offered an identical newly-created vacant 32-hour per week position to a full-time employee who was faced with separation because of RIF. The Board noted that under 5 CFR 351.403(b)(5) (cite taken from the pre-July 3, 1985, RIF regulations), differences in work schedules may not serve as the basis for separate part-time competitive levels; the appellant's position was thus not abolished and the full-time employee had no assignment rights to the appellant's position. The Board noted further that the RIF regulations do not seek to authorize an agency to displace an other-than-full-time employee by a full-time employee. See 5 CFR §351.703(b).

(vii) Washington v. Tennessee Valley Authority, MSPB Docket No. AT03518210346 (August 3, 1984).

After the agency removed the appellant from his position under the 5 CFR part 752 adverse action procedures, the Board on appeal mitigated the adverse action to a reprimand and ordered the agency to cancel the removal action. Upon receiving the Board's order the agency advised the appellant that it had abolished his position by RIF during the period his adverse action appeal was pending. After adjudicating the appellant's subsequent appeal of the RIF action, the presiding official ordered the agency to cancel the RIF action after finding that the appellant was not on the agency's rolls when the RIF action was effected. The agency filed a petition for review, arguing that the appellant would, in fact, benefit from the adverse action if he was totally excluded from the later RIF action. The Board reversed the initial decision of the presiding official and affirmed the RIF action after determining that the agency had properly reconstructed how the appellant would have been affected by the retroactive RIF, and offered the appellant the right to challenge the RIF to the Board. Under the Board's final order the appellant was entitled to benefits from the period beginning with his wrongful separation under the adverse action procedures, and ending with the effective date of the retroactive RIF.

Constance Horner
Director

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